A **STEPHANE-HENRI MAURICE JACQUES GREGOIRE**

v.

NORAINI ABDUL MURAT

B HIGH COURT MALAYA, KUALA LUMPUR
ROSILAH YOP JC
[CIVIL SUIT NO: 23NCVC-39-03-2013]
12 SEPTEMBER 2013

C ***CIVIL PROCEDURE:*** *Security for costs - Application for - Plaintiff claimed against defendant for slander - Claim for damages - Plaintiff a Belgian citizen with no permanent address nor assets within jurisdiction of court - Whether defendant had meritorious defence to plaintiff's claim - Whether there was reason to believe that plaintiff was unable to pay* D *defendant's cost to defend action - Whether sum for security of costs reasonable - Rules of Court 2012, O. 23 r. 1*

The present application arose from a claim by the plaintiff, a Belgian citizen, against the defendant for slander, based on certain E statements that the defendant had purportedly made to the plaintiff. Pursuant to a domestic inquiry, the plaintiff was dismissed from his employment. The plaintiff subsequently commenced an action against the defendant seeking, *inter alia*, for substantial amounts of general, aggravated and exemplary damages in addition to special damages in the sum of RM1,200,000. The defendant F filed the present application pursuant to O. 23 r. 1 of the Rules of Court 2012 ('ROC') for the orders that, *inter alia*, (i) the plaintiff give security for costs to the defendant in the amount of RM200,000; and (ii) that the plaintiff's action be stayed pending disposal of this application. In support of her application, the G defendant submitted that (i) the plaintiff was a Belgian with no permanent address nor assets within the jurisdiction of the court; (ii) the defendant had a meritorious defence to the plaintiff's claim and there was reason to believe that the plaintiff was unable to pay the defendant's costs to defend this action; (iii) the sum of H RM200,000 was reasonable; and (iv) the application was made immediately and there was no issue of unreasonable delay.

Held (allowing application):

I **(1)** The plaintiff failed to prove that he was ordinarily resident in this country. The plaintiff was a citizen of Belgium with no permanent residential address in Malaysia. The nature of the plaintiff's job was that he was always posted everywhere in

areas of disaster around the world. He was frequently out of the court's jurisdiction and was in various countries. The plaintiff was free to leave the country at any time. Since the plaintiff was frequently out of the country, it was necessary that he be required to furnish the security for costs. (para 20)

(2) The plaintiff did not have a permanent job in Malaysia following his termination of employment. Although the plaintiff stated that he had given consultancy services through his company, the defendant was unable to verify the authenticity of such claim. Furthermore, the company was incorporated in Belgium and not within the jurisdiction of this court. The plaintiff did not have assets in Malaysia and his current residence was the address of his rental home. The assets disclosed by the plaintiff could not be verified by the defendant as there was no documentary evidence produced to prove it. The plaintiff's explanations did not prove that he had sufficient assets to maintain this action and if security for costs was not ordered against the plaintiff, there was a real risk that the defendant would be left in the lurch in defending this action. (paras 21, 24 & 25)

(3) The defendant had a meritorious defence against the plaintiff's claim. The plaintiff's claim against the defendant was for damages in defamation. The application for security for costs in the sum of RM200,000 was not made to stifle the plaintiff's claim but to seek protection for the defendant's costs. Without this order, the defendant would be left in the dark with no protection for its costs. The sum of RM150,000 was reasonable for the security for costs to the defendant. (paras 27 & 30)

Case(s) referred to:

Hoh Kiang Ngan & Ors v. Hoh Han Keyet [2013] 5 CLJ 222 CA ***(refd)***

Kasturi Palm Products v. Palmex Industries Sdn Bhd [1985] 1 LNS 149 HC ***(refd)***

Shah v. Barnet London Borough Council and other Appeals [1983] All ER 226 ***(refd)***

Legislation referred to:

Rules of Court 2012, O. 23 r. 1(1)

A *For the defendant - Kavitha Karuppannan; Shearn Delamore & Co*
For the plaintiff - Shankar Gunaratnam; M/s Rose Hussin

Reported by Najib Tamby

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JUDGMENT

Rosilah Yop JC:

Enclosure 11

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[1] This is defendant's application pursuant to O. 23 r. 1 of the Rules of Court 2012 and/or the inherent jurisdiction of the court for the following orders:

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(i) that the plaintiff be ordered to give security for costs to the defendant of RM200,000 to be deposited in court or bank guarantee addressed to the defendant within seven days from the date of the order;

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(ii) subsequent to prayer (1) above, the action of the plaintiff against the defendant be stayed pending the disposal of this application and compliance by the plaintiff with the order granted in accordance with the prayer (1) above;

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(iii) if the plaintiff fails to furnish security for costs, the plaintiff be ordered in accordance with defendant's prayer (1) above, the writ of summons and statement of claim dated 20 March 2013 be struck out with no liberty to file afresh and costs to be paid by the plaintiff to the defendant immediately;

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(iv) costs of this application be paid by the plaintiff to the defendant immediately, or

(v) any order and/or relief deemed fit and proper by this court.

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Salient Facts

[2] The plaintiff is of Belgian citizenship and was the former Director of the International Planned Parenthood Federation's East and South East Asia and Oceana Region's (IPPF ESEAOR) SPRINT (Sexual and Reproductive Health Programmed in Crisis and Post-Crisis Situation) programme.

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[3] At the material time, the defendant was the plaintiff's immediate supervisor and is the Regional Director of IPPF ESEAOR.

[4] The plaintiff's claim against the defendant is for slander, based on certain statements that the defendant had purportedly made to the plaintiff on 22 January 2013 following a notice to show cause that was issued to him.

[5] The notice to show cause was issued to the plaintiff following his breach of the terms of reference and IPPF ESEAOR's Human Resource Policy in reviewing an internal grievance reported by an officer of IPPF ESEAOR, Ms Vilasini Seevanathan against her superior, and Ms Alejandra Trossero.

[6] A domestic inquiry was subsequently held against the plaintiff and he was dismissed from his employment with IPPF ESEAOR on 21 March 2013.

[7] The plaintiff commenced this action one day prior to his dismissal, on 20 March 2013, alleging that the statements purportedly spoken by the defendant were defamatory of the plaintiff and the plaintiff seeks among others, for substantial amounts of general, aggravated and exemplary damages as well as special damages alone in the sum of RM1,200,000.

Submission By Parties

[8] The application is made pursuant to O. 23 r. 1, Rules of Court 2012.

The defendant's reasons are that:

(i) the plaintiff is a citizen of Belgium, and it is within the knowledge of the defendant that the plaintiff does not have a permanent address or have any assets within the jurisdiction of this court;

(ii) on 21 March 2013, the plaintiff was dismissed from his employment with IPPF ESEAOR;

(iii) the defendant has a meritorious defence to the plaintiff's claim and there is reason to believe that the plaintiff is unable to pay the cost of the defendant to defend this action;

(iv) the sum of RM200,000 is a reasonable request for security for costs given the nature of plaintiff's claim, the quantum of damages applied and the work involved; and

(v) the application was made immediately and there is no issue of unreasonable delay.

[9] The plaintiff objected to defendant's application on the following reasons:

(i) the plaintiff has lived in Malaysia since 2006 and the defendant knows about this. Plaintiff had an asset at Taman Desa from 2008 to 2012 but was sold for RM500,000 and currently rented a house at Taman Seputeh.

(ii) Plaintiff has savings amounting to RM40,000 in Malaysia.

(iii) Plaintiff has a total of RM100,000 in a fixed deposit account in the name of his spouse, Judy James, where the plaintiff had access to the said account.

(iv) Plaintiff has the Naza Citra vehicle valued at RM35,000 and Triumph TR4A worth RM110,000.

(v) the plaintiff also has securities or stock valued at RM250,000 in Keytradebank and assets in Brussels, Belgium worth RM1 million.

Findings of the Court

[10] This court has an unfettered discretion pursuant to O. 23 r. 1(1), The Rules of Court 2012 to order the Plaintiff to give the security for costs where it appears among others that the Plaintiff is ordinarily resident out of the jurisdiction.

[11] Order 23 r. 1(1), The Rules of Court 2012 provides:

> 1.(1) where, on the application of a defendant to an action or other proceedings in the Court, it appears to the Court:
>
> (a) that the plaintiff is ordinarily resident out of the jurisdiction,
>
> (b) ...
>
> (c) ...

then, if, having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the plaintiff to give such security for costs for the defendant's costs of the action or other proceedings as it thinks just.

Whether The Plaintiff Is Ordinarily Resident Out Of The Jurisdiction

[12] It is trite that when determining the principal or only place of residence of a person, the court has to consider various factors and the weight to be attached to such factors. The court has to consider:

(i) the length of time spent at one place,

(ii) the connection the person has with that place,

(iii) the frequency of residence,

(iv) the element of regular occupation (whether past, present or intended for the future, even if intermittent) and some degree of permanency in the occupation of such residence - see Court of Appeal case, *Hoh Kiang Ngan & Ors v. Hoh Han Keyet* [2013] 5 CLJ 222; [2013] 4 MLJ 199.

[13] Whether the plaintiff ordinarily resident outside the jurisdiction of this court is a question of fact and depends on the particular case itself. In the case of *Shah v. Barnet London Borough Council and Other Appeals* [1983] All ER 226 states, the term "ordinarily resident" is to be interpreted in the ordinary and natural meaning of "normally the person must be habitually resident and ... apart from temporary or occasional absences for long or short duration."

[14] The onus of proving that the plaintiff is ordinarily resident outside the jurisdiction is on the defendant.

[15] It is not disputed that the plaintiff is a Belgian citizenship and does not have a permanent residential address in Malaysia. Prior to his brief employment with IPPF ESEAOR (which lasted less than four months), the plaintiff had worked in various locations around the world as early as 1988.

[16] Exhibit NM1 in the defendant's affidavit showed the curriculum vitae (CV) of the plaintiff and an application form submitted to the IPPF ESEAOR stating that the plaintiff had worked in many places in the world; are as follows:

No.	Time Period	Location
1.	December 1988 - April 1993	Antwerp, Belgium
2.	July 1994 - March 1996	Brussels, Belgium
3.	March - June 1996	Xining, China
4.	June - July 1996	Xincheng, China
5.	July - September 1996	Kupljensko Camp, Croatia
6.	September 1996 - June 1997	Sarajevo, Bosnia
7.	July 1997 - July 1998	Sarajevo, Bosnia
8.	September - December 1998	Gueckedou, Guinea
9.	February 1999 - February 2000	Mumbai, India
10.	March - August 2000	Brussels, Belgium
11.	January 2001 - December 2003	Brussels, Belgium
12.	January 2004 - January 2005	Amsterdam, The Netherlands
13.	January - March 2005	Goma, DR Congo
14.	June - October 2005	Jakarta, Indonesia
15.	October - December 2005	Islamabad, Pakistan
16.	December 2005 - May 2006	Kuala Lumpur, Malaysia
17.	2006	Indonesia
18.	2007	Islamabad, Pakistan
19.	2007 - 2009	Kuala Lumpur, Malaysia
20.	2008 - 2009	Sichuan Province, China
21.	2009 -2010	Bangui, Central African Republic

[17] Plaintiff's affidavit opposing the application itself admits the nature of his professional activity is such that he is often deployed to disaster areas for assignments. The plaintiff maintained that these assignments are short-term but it is clear that these work assignments are often for durations of one year and more.

[18] The plaintiff does not have a permanent residential address in Malaysia. His current address is the address of the tenanted premises. As such the plaintiff is free at any time to leave the country. Although plaintiff states that he usually resides within the jurisdiction of this court, but the plaintiff failed to adduce evidence that he will stay in Malaysia in a definite period of time or will continue to live in Malaysia with certainty.

[19] The plaintiff's present address is the address of his tenanted premises and the tenancy will expire on 9 December 2013.

[20] From the evidence adduced, the court found that the plaintiff is a citizen of Belgium and has no permanent residential address in Malaysia. The nature of the plaintiff's job is that he is always being posted everywhere in the disaster area in the world. He was frequently out of the court jurisdiction and was in various countries. He is free at any time to leave the country. As such the plaintiff failed to prove that he is ordinarily resident in this country. Since the plaintiff was frequently out of the country, it was necessary that he be required to furnish the security for costs.

Whether The Plaintiff Has Sufficient Assets To Maintain This Action?

[21] Plaintiff does not have a permanent job in Malaysia following his termination of employment with the IPPF ESEAOR. Plaintiff stated that he had given consultancy services through his company MADORG A.I.S.B.L and is purported paid a sum of RM800 per day for a maximum period of 160 days. However, the defendant is unable to verify the authenticity of the consulting service agreement exhibited as SG8 in plaintiff's affidavit. MADORG A.I.S.B.L is a company incorporated in Belgium and not within the jurisdiction of this court.

[22] The agreement for consultancy services for building dated 21 June 2013 and the plaintiff services under this agreement is only for a period of 160 days. This service is not of a regular basis

and the defendant failed to prove that he has other income within the jurisdiction of this court to maintain this action until its completion.

[23] The fixed deposit account shown in the plaintiff's affidavit in reply is in the name of Judy James and not in the name of the plaintiff. Plaintiff savings account only shows the remaining savings of RM40,000. The plaintiff claimed that he owned a vintage vehicle; this vintage vehicle was purchased in 2007, for the sum of RM49,000 while Naza Citra is a second hand car at RM35,000.

[24] Plaintiff also disclosed that he has assets in Belgium but the defendant cannot verify these assets. No documentary evidence produced to prove it. Plaintiff does not have assets in Malaysia. His current residence address is the address of his rental home.

[25] The explanations put forward by the plaintiff did not prove that he have sufficient assets to maintain this action and if not ordered security for costs against the plaintiff, there is a real risk that the defendant will be left in the lurch in defending this action.

Whether The Defendant Has A Meritorious Defence To The Plaintiff's Claim

[26] The defendant further contends that he has a meritorious defence to the plaintiff's claim. The plaintiff claim is for defamation. The plaintiff has to meet the three elements to sustain a cause of action in defamation against the defendant. The defendant's defence: the statements complained of are not defamatory to the plaintiff and not published to the third party and was made in the course of the defendant's duty.

[27] The defendant further relies on the defences of qualified privilege and justification. I therefore find that the defendant has a meritorious defence to the plaintiff's claim.

Conclusion

[28] The security for costs cannot be ordered as of right. The court has discretion whether to order security for the defendant's costs. The court will have to consider whether it is just to do so. In determining whether to order a plaintiff to give a security for costs, the court is to consider the circumstances of each case and

in the light thereof to determine whether and to what extent or for what amount a plaintiff should do so – see *Kasturi Palm Products v. Palmex Industries Sdn Bhd* [1985] 1 LNS 149; [1986] 2 MLJ 310 per Mohamed Dzaiddin J (as he then was).

[29] It is the usual practice of the courts to make a foreign plaintiff give security for costs but it does so as a matter of discretion because it is just to do so.

[30] The plaintiffs claim against the defendant is for damages in defamation. The application for security for costs is for RM200,000. The application was made not to stifle the plaintiff's claim but to seek the protection for the defendant's costs. Without this order for security for costs the defendant would be left in the dark with no protection for its costs. Based on the trend of award on damages given to the defamation suits by the courts now, the sum of RM150,000 is the reasonable for the security for costs to the defendant.

[31] In the premise and for the reasons above, the defendant's application is allowed. The plaintiff is to pay the sum of RM150,000 and to be deposited by a bank guarantee made to the defendant's counsel within 14 days from today. Costs of RM3,000 to the defendant for this application.